No. 11957

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA SHIP SERVICE COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, 13TH COMPENSATION DISTRICT,

Appellee.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

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Statement of the Case.

This is an appeal from a decree of the United States District Court for the Southern District of California, Central Division, Honorable Charles C. Cavanah, District Judge, confirming a compensation order of the Deputy Commissioner filed on June 5, 1947, in which he awarded compensation to Louise Johnson, Sr., mother, and six minor brothers and sisters, respectively, of Robert Johnson, Jr., who sustained fatal injuries on December 6, 1945, in the course of his employment as a laborer by the California Ship Service Company on a vessel in Los Angeles Harbor. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat.

1424, 33 U. S. C. A. sec. 901 *et seq.*) The compensation liability of the employer was insured by the Appellant Fireman's Fund Insurance Company.

The claim for compensation was controverted by the employer and insurance carrier, and hearings were duly held before Deputy Commissioner Joseph H. Henderson at New Orleans, Louisiana, on June 4, 1946, and July 16, 1946. The testimony taken at said hearings is printed in the Apostles on Appeal and will be referred to later.

Facts.

The Deputy Commissioner in the compensation order complained of found the facts with reference to the employee's fatal injuries and his family's dependency to be in part as follows:

> "That on the 6th day of December, 1945, Robert Johnson, Jr., was in the employ of the employer above named at Los Angeles Harbor, in the State of California in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day the said employee while performing service for the employer as a laborer and engaged at ship repair operations on a completed vessel on navigable waters of the United States at said Harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in death the same day as follows: He fell from a ladder while descending into a tank of the ship, sustaining fatal in-

jury; that the employer furnished the employee with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average weekly earnings of the employee at the time of his injury exceeded $37.50; that the employee left surviving him and dependent in fact upon him for support his mother, Louise Johnson, Sr., born December 28th, 1905, and adult sister, Louise Johnson, born December 11, 1922, a child of said Louise Johnson named Joseph Charles Forest Johnson born October 19, 1945, and the following minor brothers and sisters: Lucille Idel Johnson born February 28, 1929, Edwin Johnson born July 22, 1930, Hilda Mae Johnson born March 30, 1932, Harold Johnson born April 4, 1934, Walter Johnson born June 22, 1936, and Rosalis Johnson born November 20, 1940; that claimants Louise Johnson, Sr., Lucille Idel Johnson, Edwin Johnson, Hilda Mae Johnson, Harold Johnson, Walter Johnson and Rosalis Johnson are entitled to a death benefit at the rate of 25 per cent of the average weekly wages of the employee for Louise Johnson, Sr., his mother, and 15 per cent of said weekly wages for each of the said minor brothers and sisters, the share of each minor child to run until such child reached or will reach the age of 18 years, provided however, that the total allowance to all dependents may not exceed 66⅔ per cent of said average weekly wages or $25.00 a week. That such death benefit at the rate of $25.00 a week shall be paid to Louise Johnson, Sr., for the support and maintenance of herself and said minor children, commencing with the date of the death

of the said Robert Johnson, Jr.; amount accrued to and including the date of the hearing July 2, 1946, 29 5/7 weeks is $742.85, no part of which has been paid; that Louise Johnson, a sister born December 11, 1922, was wholly dependent upon the deceased employee at the time of his death for her support but was over the age of 18 years and has not been shown to have been physically or mentally incapacitated from earning her living, and is not entitled to share in said death benefit; that a child of said Louise Johnson, Joseph Charles Forest Johnson, born October 19, 1945, was a nephew of the deceased employee and wholly dependent upon him for support at the time of his death, but is not within the relationship to the employee within which valid claim may be made for death benefit; that the reasonable expense of burial of the employee was over $200.00 and that $511.75 is owing thereon by claimant to W. D. Fisher & Son, Inc., Undertakers, 4700 Avalon Blvd., Los Angeles; that claimants are entitled to an allowance of $200.00 upon said burial expense to be paid direct to said undertaker, that J. Warren Woodville, claimant's attorney, 821 Maison Blance Building, New Orleans, 16, La., has rendered legal service to claimants in the above matter in the present claim for which a fee is approved in the sum of $65.00 and lien granted thereon on compensation herein awarded."

The employer and carrier instituted a proceeding for judicial review of the compensation order pursuant to Section 21(b) of the Longshoremen's Act (33 U. S. C. A. Sec. 921(b)) alleging in substance that the compensation order was not in accordance with law.

The court below by judgment on March 15, 1948, sustained the award of the Deputy Commissioner and it is from said judgment that this appeal is taken.

ARGUMENT.

I.

The Findings of the Deputy Commissioner as to the Dependency of the Mother and Brothers and Sisters Is Supported by Evidence.

Following is a reference to so much of the testimony taken at the hearing before the Deputy Commissioner as is considered sufficient to show that the above-mentioned finding of fact of the Deputy Commissioner is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the Deputy Commissioner.

Louise Johnson, Sr., the claimant, herein testified at the hearing on July 16, 1946, that she lives at 8821 Cohn Street, New Orleans; that she is 41 years of age and is the mother of the deceased and that Robert Johnson, Sr., is the deceased's father; that she and the boy's father married on December 23, 1919, at New Orleans, and have lived together ever since; that the deceased was born May 27, 1924, making him 21 years of age on last May [Ap. 22, 23]; that the deceased went to the West Coast in the early part of 1944 [Ap. 49]; that he contributed to her support; that he sent her $30.00 (a week) when he first went out there and then $15.00 per week until her daughter (who also went to California in December, 1944 [Ap. 28], became pregnant [Ap. 25] (the child was born October 19, 1945) [Ap. 33]; that before her daughter became pregnant the deceased sent her money regularly but after that he sent money from time to time but not regularly [Ap. 52]; that her son sent her money all during 1945, the last time being in November when he sent her two $10.00 bills; that in the previous July or August her

son sent her $15.00; that in June before that he sent her $15.00 [Ap. 26, 27]; that she also received some money in May, the amount of which she could not remember [Ap. 28]; that she received these payments through the Western Union and when she went to the Western Union to get some record of these she was informed that she would have to know the dates [Ap. 29, 53]; that deceased sent her $30.00 in April, 1945, at Easter time to get clothes for the children; that from January 1, 1945, until she received the $30.00 at Easter, he used to send her money the first part of the month regularly until he had to take care of her daughter (the deceased's sister) who had become pregnant in California [Ap. 29]; that her deceased son then supported her daughter for a time *beginning about four or five months after the daughter became pregnant but that previous to that the daughter was living with her common-law husband* with whom she had been living since she went to California in early December, 1944 [Ap. 34, 35]; that her daughter had gone to work in a rubber factory that same December [Ap. 39]; *that previous to her son helping her daughter she used to receive from her son $15.00 twice a month right along,* and sometimes three times a month [Ap. 29]; that she received $15.00 in March by Western Union money order on two different occasions [Ap. 30]; that with the money which she received from her son she took care of her six children; that the money she received was spent on these children toward their support; that she used it to buy clothes and food for them and to send them to school, and that one girl graduated on the money which her son sent; that all the money which she received from her son was spent for these purposes [Ap. 32]; that the deceased also sent her money during the year 1944 [Ap. 49]; that during all this time her husband was making $28.00 a week and there were six children being supported

besides herself and her husband [Ap. 53, 54]; that none of these children were working and they were paying $12.00 a month rent for their home; that the whole family had to be supported out of her husband's income which was insufficient to meet the living expenses; that she could not get along with what her husband made because of the high prices [Ap. 54]; that that was the reason why the deceased went to Washington State, to make more money and help to support the family and this was why he sent the money to help support the children, his father and herself [Ap. 55]; *with this money she bought clothing and paid for all other necessities for herself, the children and her husband, and for the upkeep of her home; that she relied upon and looked forward to receiving the money her boy sent her to help* meet the family expenses; that she had no other source of help other than her husband as none of the other children were working [Ap. 56, 57]; that besides her rent of $12.00 per month, she had to pay insurance totaling about $18.00 per month, and something over $8.00 per month as payment on their furniture [Ap. 59, 60].

At the same hearing it was stipulated that the deceased's wages at the time of his death were $29.62 per week [Ap. 20].

It is submitted that the above testimony supports the deputy commissioner's finding that the mother and minor brothers and sisters were dependent upon the deceased employee.

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *Cardillo, Deputy Commissioner, v. Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947); *South Chicago Coal & Dock Co., et al., v. Bassett, Deputy Commissioner*, 309 U. S. 251 (1940):

Del Vecchio v. Bowers, 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U. S. 162 (1933); *Crowell, Deputy Commissioner, v. Benson,* 285 U. S. 22 (1932); *Jules C. L'Hote, et al., v. Crowell, Deputy Commissioner,* 286 U. S. 528 (1932), 71 C. J. 1297, Sec. 1268; *Parker, Deputy Commissioner, v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Marshall, Deputy Commissioner v. Pletz,* 317 U. S. 383 (1943).

The deputy commissioner's findings of fact in questions of dependency are final and conclusive when supported by evidence: *Jules C. L'Hote v. Crowell, Deputy Commissioner,* 286 U. S. 528 (1932). (Accord: *Texas Employers Ins. Assoc. v. Sheppeard, Deputy Commissioner,* 62 F. 2d 122 (C. C. A. 5, 1932); *Harris v. Hoage, Deputy Commissioner,* 66 F. 2d 801 (App. D. C. 1933); *Ottenstein v. Britton, Deputy Commissioner,* 160 F. 2d 253 (U. S. App. D. C. 1947).) In the *L'Hote* case, *supra,* the Supreme Court in a *per curiam* opinion reversed the United States Circuit Court of Appeals for the Fifth Circuit in a case where the District Court and the Circuit Court of Appeals had failed to give *conclusive effect* to a finding of the deputy commissioner in a case involving a question of dependency, where there was evidence to support the finding.

The decisions under the Longshoremen's Act, to the effect that the question whether the parent of a minor child was dependent upon him is one of fact, are consistent with the decisions under other like compensation laws. This accord may be noted by comparison with the following cases: *Sallee v. Calhoun,* 46 N. M. 468, 131 P. 2d 276 (1943); *Moorer v. Putnam Lumber Co.* 29 S. E. (2d) 709 (Ga. App. 1944); *Wilken v. Shein's Express Co.,* 131 N. J. L. 450, 37 A. 2d 47 (1944); *Crossett Lumber Co. v.*

Johnson, 187 S. W. 2d 161 (Ark. 1945); *Froman v. Banquet Barbecue,* 284 Mich. 44, 278 N. W. 758 (1938); *Garbutt v. Stoll,* 287 Mich. 393, 283 N. W. 624 (1939); *Batelbo v. J. H. Tredenwick,* 64 R. I. 326, 12 A. 2d 282 (1940); *Guidry v. Swift & Co.,* 199 S. 619 (La. App. 1941); *Smith v. Roth Cadillac Co.,* 145 Pa. Super. 292, 21 A. 2d 127 (1941); *Crane Co. v. Industrial Comm.,* 378 Ill. 190, 37 N. E. 2d 819 (1941).

Under the Longshoremen's Act it is not necessary to establish total or complete dependency, nor does the Act provide that the dependency shall be to a *substantial extent.* A showing of *partial* dependency satisfies the statute. See *Leon A. Harris, t/a L. A. Harris Company, v. Hoage, Deputy Commissioner,* 66 F. 2d 801 (App. D. C. 1933); *Pocahontas Fuel Company, Inc., v. Monahan, Deputy Commissioner,* 41 F. 2d 48 (C. C. A. 1, 1930); *Michigan Transit Corp. v. Brown, Deputy Commissioner,* 56 F. 2d 200 (D. C. Mich. 1929); *Texas Employers' Insurance Association v. Sheppeard, Deputy Commissioner,* 62 F. 2d 122 (C. C. A. 5, 1932); *London Guarantee and Accident Company, Ltd., v. Hoage, Deputy Commissioner,* 75 F. 2d 236 (App. D. C. 1934); *Wende v. McManigal, Deputy Commissioner,* 135 F. 2d 151 (C. C. A. 2, 1943); *Norfolk Shipbuilding & Dry Dock Corp. v. Parker, Deputy Commissioner,* 154 F. 2d 560 (C. C. A. 4, 1946); *Ottenstein v. Britton, Deputy Commissioner,* 160 F. 2d 253 (U. S. App. D. C. 1947).

See also the following additional compensation cases wherein an award was affirmed, involving questions of dependency (nearly all as partial dependency cases) arising out of contributions of deceased sons to the support of their parents and other relatives: *Paul v. State Ind. Accident Com.,* 272 Pac. 267 (Ore. 1928); *Pusher v. American*

Ry. Exp. Co., 183 N. W. 839 (Miss. 1921); *Associated Employers' Reciprocal Ass'n v. Lawrence,* 264 S. W. 1038 (Tex. 1924); *States Engineering Co. v. Harris,* 146 Atl. 392 (Md. 1929); *Scuddy Coal Company v. York,* 26 S. W. 2d 34 (1930); *Ogden City v. Industrial Commission of Utah,* 193 Pac. 857 (Utah 1920); *Bylow v. St. Regis Paper Co.,* 166 N. Y. Supp. 874 (N. Y. 1917); *Kostemo v. H. G. Christman Co.,* 214 Mich. 652, 183 N. W. 902; *In re Peters,* 116 N. E. 848 (Ind. 1917); *Littell v. Lagonarcino Grape Company,* 17 N. W. 2d 120 (Iowa 1945); *Arthur Murray Co. v. Cole,* 189 S. W. 2d 614 (Ark. 1945); *Harvey v. Rocklin Mfg. Co.,* 24 N. W. 2d 402 (Iowa 1946).

In *London Guarantee and Accident Company, Ltd., v. Robert J. Hoage, Deputy Commissioner, supra,* 75 F. 2d 236, *which arose under the Longshoremen's Act* as applied in the District of Columbia and where it was held that the mother of a deceased employee was dependent upon him, *notwithstanding that the employee's father at the time of the son's death was regularly employed and was receiving wages in the amount of $77.00 a week.* The court in this case said:

> "The family kept no records of the housekeeping disbursements, but the father and mother estimated the expenses of maintaining the family at approximately $4,000 a year. All of this, apparently, was paid out of a fund handled by the mother and recruited from time to time by the wages, in whole or in part, of the father and the two sons.
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> * * * * * * * *
>
> "We do not mean to be understood as intimating that the *mere possession of the bare necessities of life is sufficient to take one out of the role of dependency* where other circumstances bring that condition into

operation, nor to confine our definition of dependents to those persons who are not able to support life without assistance, *for if in fact they depend on such assistance as a part of their means of living, and help from others is necessary to sustain them in the position to which they are accustomed to live, they would, as we think, be properly classed as dependents under the statute.*

* * * * * * * *

"The case of the mother presents a somewhat different problem. She had neither property nor income and was wholly dependent on others for her maintenance, and, while it is true her husband owed her the duty of support and had the means to discharge it, the evidence liberally construed in favor of her claim, as we think it should be, may be said to show that *she relied on and received from her son regularly monthly sums of money, which she used and required in part for her support.* That she lived better and more comfortably as the result of the son's contribution does not destroy her claim of partial dependency. It is enough if she depended and relied on what he gave to enable her to enjoy the ordinary and reasonable necessities of life suitable to a person in her position. This, as we think, the evidence shows." (Emphasis supplied.)

In *Texas Employers Ins. Assn. v. Sheppeard, Deputy Commissioner, supra,* in the fifth circuit, the court stated:

"Within the meaning of the act the father and step-mother of the deceased may have been partially dependent on him, though his contributions were not necessary to enable them to be supported without the help of another or others. The fact that much of the larger part of money used in the support of the family was supplied by the father was not inconsistent with

the father and stepmother being partial dependents of the deceased if the contributions the latter was in the habit of making were required to enable them to meet the reasonable necessary expenses of living in the way to which they were accustomed, and they looked forward to and relied on the continuance of such contributions for their support."

See also *Michigan Transit Corp. v. Brown, Deputy Commissioner, supra,* wherein the court stated:

"Dependency has been generally held not to mean absolute dependency for the necessities of life, but rather that applicant *looked to and relied upon the contributions of the injured employee in whole or* part as a means of supporting and maintaining himself or herself in accordance with the accustomed mode of life." (Emphasis supplied.)

In the recent case of *Wende, et al., v. McManigal, Deputy Commissioner, supra,* in the second circuit, the court said:

"Parents are dependent if their own resources are not sufficient to support them, even if they receive help from their other children. To be sure, the parents were not dependent in the sense that they would have been destitute without decedent's financial assistance. But that is not the test; *the test is whether his contribution was in whole or in part a means of maintaining them in the manner in which they had been living and whether they looked forward to and relied upon the continuance of decedent's contributions to that end.*" (Emphasis supplied.)

In *Norfolk Shipbuilding & Dry Dock Corp. v. Parker, Deputy Commissioner, supra,* in the fourth circuit, the court said:

> "These findings were based on testimony of the mother to the effect that she used the full amount of the money paid to her by her deceased son in the home and in paying bills for food and other household expenses, and that while she kept no accounts she felt after his death the lack of the money which he had paid to her in his lifetime and realized that she did not have as much to spend for the family as she had had prior to his death. The appellant contends that since the mother did not furnish any figures to show the amount spent by her for food in the household, or to show that the weekly payments of $15 by the son exceeded the cost of the meals and other expenses entailed by reason of the presence of himself and his wife in the family circle, therefore there was no substantial evidence to support the finding of dependency. We do not think that this argument is tenable. There was enough in the record to support the conclusion of the Deputy Commissioner that the expense of housing and feeding the family of five, including the son and his wife, was more easily borne with the weekly payment of $15 included in the family budget than it was after the payment ceased and the son and his wife no longer were members of the family. That indeed was the substance of the mother's testimony; and it does not appear that the general household expenses, other than food, were substantially greater because of the presence of the son and his wife in the family group.
>
> The appellant suggests that after the son's death the mother could have more than made up the loss of income derived from him by furnishing room and board to an outside couple at more than $15 per week. We do not understand that dependency, as a term as

used in the statute, is to be determined on such a basis. The statute expressly provides, 33 U. S. C. A. App. sec. 909(f), that all questions of dependency shall be determined as of the time of the injury; and it is generally held under compensation acts that the right of a parent to death benefits does not turn upon the ability of the parent to support life after the death of the child, but recovery is allowed where the parent depended, at least in part, for the maintenance of his accustomed standard of living upon the contributions of the deceased. *London Guarantee & Accident Co. v. Hoage* (App. D. C.), 75 F. 2d 236; *Engineering Co. v. Harris,* 157 Md. 487; *Pusher v. American Ry. Exp. Co.,* 149 Minn. 308.

In the instant case the evidence indicates partial dependency upon the assistance of the son, and partial dependency is sufficient to support an award of the percentage of the wages of the deceased specified in the statute; *Harris v. Hoage,* App. D. C. 66 F. 2d 801; *Texas Employers' Ins. v. Sheppard,* 5 Cir. 62 F. 2d 122; *Pocahontas Fuel Co., Inc., v. Monahan,* 1 Cir., 41 F. 2d 48."

In *Pocahontas Fuel Co. v. Monahan, deputy commissioner, supra,* in the first circuit, the court said:

> "We do not regard the fact that the father was possibly earning sufficient money to support himself alone as the test of his dependency."

Following are cases in which awards were made under the New York compensation law from which the Longshoremen's Act was largely adopted, for fatal injuries to sons who had lived in their parents homes, as reported

in the New York State Industrial Commission Special Bulletin No. 161, on page 146:

"A rigger hurt by a fall; award to mother; lived with her and her husband whom she had married within the year; had supported her before the marriage; after it, gave her $9 a week regularly and other money, presents and supplies now and then: *Blauvelt v. Thurber,* 221 App. Div. 826."

"A steamfitter's helper killed by a fall; award to mother; lived with her and her husband, his stepfather, who was sickly; gave her $25 or $30 a week; she herself earned living premises and $10 a month as a caretaker: *Donnelly v. Kingsley & Co.,* 221 App. Div. 823."

"A nineteen year old solderer fatally injured while using an air jack; award of accrued disability compensation and death benefits to his mother; lived with parents and four other children; paid $7 of his $18 weekly earnings into the family pot; his father earned $37 a week; *Hobart v. Prest Air Devices,* 224 App. Div. 799."

"A carpenter killed by an elevator; award to his seventy-two year old grandmother; mother insane; grandmother had taken her place and reared him with his four brothers and sisters; he had contributed $15 a week to the family pot: *Janecock v. Bonded Floors Co.,* 223 App. Div. 805."

"A twenty-two year old lineman electrocuted by a live wire; award to father and mother; lived with them on fifty-three acre farm; father's age was sixty-four; son gave mother $5 a week, also gave father money to buy food and pay taxes: *Jansen v. Harlem Valley Electric Corp.,* 222 App. Div. 786."

"A pumpman killed by falling roof rock; award to mother; lived with parents, two brothers and a sister; father had been unwell; earned more than father; gave mother $15 a week and bought things for the house; *Linderman v. Beaver Products Co.,* 222 App. Div. 844."

"An eighteen year old laborer killed by a fall; award to father; lived on ten acre farm with father; mother and sixteen year old sister; mother and sister did not file claims; son had promised to help pay for and stock the farm; had worked for his employer but ten days: *Rifenbark v. Mohawk Limestone Products Co.,* 224 App. Div. 803."

"Boilermaker's helper, twenty-one years old, killed by collapse of a scaffold; award to mother; lived with father, mother, three brothers and a sister; home mortgaged; father earned $24 a week; deceased $23, of which $13 went to the family; *Sidoti v. Dutchess Bleachery,* 222 App. Div. 705."

Temporary Suspension of Contributions.

The temporary suspension or reduction, in whole or in part, of the contributions from the deceased to his mother during the period in which he was caring for his sister did not as appellant contends change the status from dependency to non-dependency. The dependency continued even though the deceased temporarily was unable to supply the need both of his sister and of his mother and her family. The courts have uniformly so held in similar situations.

Section 9(f) of the Longshoremen's Act (33 U. S. C. A. Sec. 909(f)), provides that all questions of dependency shall be determined as of the time of injury, or, to state it otherwise, the determinative question is whether the

claimant was dependent upon the deceased at the time of the injury (or death, as a previous section includes "death" within the term "Injury." In the instant case the injury and death occurred on the same day).

Dependency is a condition wherein the dependent person looks to another source than his own means for his support. *Utah Fuel Co. v. Industrial Comm.,* 15 P. 2d 297, 80 Utah 301; *Ash v. Modern Sand & Gravel Co.,* 122 S. W. 2d 45, 234 Mo. App. 1195. In order to determine whether that condition or status existed at the time of injury and whether claimant actually did, or might reasonably be expected to, look to deceased for support, it is necessary to consider evidence leading up to and prior to the date of injury. In other words, while the status or condition has to be determined as of the time of injury, the evidence upon which the determination of that status or condition is to be made obviously cannot be confined to the date of injury.

The evidence usually presented to show dependency relates to contributions made by deceased to the claimant. If the evidence shows that deceased for some time prior to the injury contributed to the support of the claimant, who had no other means of support or whose means of support were insufficient, the proof would establish dependency. As indicated above, proof of contributions is the evidence usually presented, but the condition of dependency could exist although there is no evidence that at the time of injury the deceased was actually making contribu-

tions to the dependent; for example, a parent may be dependent upon a child and the latter, although he recognized the dependency in the past, may have been temporarily unable, by reason of illness, unemployment or other circumstances, to make contributions just prior to the injury. *Empire Zinc Co. v. Industrial Comm.,* 77 P. 2d 130, 102 (Colo. 1937); *LaSalle County Carbon Coal Co. v. Industrial Comm.,* 356 Ill. 421, 190 N. E. 627 (1934); *Shaffer v. Williams Bros.,* 44 S. W. 2d 185, 226 No. 635 (1931); *Illinois Steel Co. v. Industrial Comm.,* 139 N. E. 921, 308 Ill. 466 (1923). In the *LaSalle* case, *supra,* the deceased employee had for several years paid $25.00 per month regularly to his older brother and sister-in-law for the support of his aged father who had been unable to work for six years. For two months he failed to pay the $25.00 per month for his father's keep when it became due, but shortly before he was killed he told his father that when he got his first pay he would pay all arrears due. The court said:

> "The record discloses ample competent evidence to establish the dependency of plaintiff upon his deceased son when the latter met his accidental death. The evidence shows conclusively that the two months' break in monthly payments for plaintiff's board did not disestablish the relation of dependency which all the parties had recognized for years. * * * This testimony, in effect, established that the failure of Louis to pay for his father's support was temporary only, necessitated by his present lack of money. It

was proper, though not essential, to show the cause for the lapsed payments by the only persons who knew about it, even though other competent evidence clearly showed a continuing and long established dependency. On questions of dependency, the workmen's compensation act should receive a practical and liberal construction. Dependency, once recognized and firmly established by regular contributions for support over a reasonable course of time, is not abruptly terminated by a temporary failure of the contributor to meet his obligations of support as they become due, in the absence of proof that the relationship has definitely ceased to exist by the action of one or both of the parties."

In the case of *Williams v. John B. Kelly Co.*, 193 Atl. 79 (Pa. Sup. 1937), a mother sought compensation for the death of her son. It appeared that he had helped to support his mother in the past but that owing to his unemployment, the contributions had temporarily ceased; he secured employment again, but was killed shortly after his first pay from which he had sent her nothing, owing to the necessity of buying shoes and clothing; he had, however, expressed an intention of sending her money from his new employment. The court said:

"The fact finding authorities were warranted in finding that claimant was patrially dependent upon her deceased son. The fact that no contributions were made from the one pay the son received is fully explained by the boarding housekeeper—that they were used by him to buy needed shoes and clothing. Such

temporary cessation of contributions did not establish that the dependency, which previously existed, had ceased. The testimony would have warranted a finding that the mother was actually in need of support, as she was unemployed and had been subsisting upon the contributions made by the son and the married daughter. Under such proof, where contributions were in fact made by the son, his legal obligations to maintain and support his mother qualified her as a dependent."

As illustrating the point that contributions are not the *sine qua non* in proof of dependency, in the case of *Balchazar v. Swift & Co.,* 120 So. 896, 10 La. App. 25, a parent in destitute circumstances at the time of death of her son, was held "actually dependent" upon him, under the workmen's compensation law, in view of the legal duty of a child to maintain his parent in need, as provided by the State law, although the deceased child in this case had never in fact contributed anything to the support of his parent, prior to injury. In another case, under the Federal statute, authorizing recovery for death of an interstate railroad employee, it was stated that "dependency" may be founded upon a merely moral obligation resting upon the deceased to render such aid, since a "dependent" is one who is sustained by another or relies for support upon the aid of another, to whom he looks for reasonable necessaries consistent with dependent's position in life. (*Saderstrom v. Missouri Pacific R. Co.,* Mo. App. 141 S. W. 2d 73, 79.)

In another case, arising in Georgia, where under the law dependency must have actually existed at the time of the accident *and three months prior thereof,* it was recognized that physical contributions of cash or supplies are only evidential of such dependency, and the fact that they were temporarily interrupted by unemployment, or some cause independent of the will or desire of the employee, and were not made continuously for the three-month period immediately preceding injury as the statute requires, will not necessarily negative dependency, where other evidence showed such dependency. (*Maryland Casualty Co. v. Campbell,* 129 S. E. 447, 34 Ga. 311 (1925).)

The *need* of the dependent having been established, dependency upon the employee can be shown in other ways, one of which would be by acknowledgment on the part of the employee of his intention, will or desire to aid the dependent, in recognition either of his moral or legal obligation to do so, which may derive support from evidence of his past performance in this respect. The facts in each case are largely controlling, and even though the dependent may have several children, in some cases the dependent may show that a particular child was the one looked to or relied upon for aid, and with respect to whom there may reasonably be expectation of such aid, even though fortuitous circumstances may have temporarily prevented actual contributions.

It is respectfully submitted that the evidence clearly shows the partial dependency of the mother and minor brothers and sisters at the time of her son's injury and

death of a degree well within the degree of dependency shown in the cited decisions and is sufficient to support the finding of dependency at that time. (Section 9(f) of the Act, 33 U. S. C. A. Sec. 909(f) provides that all questions of dependency shall be determined as of the time of injury.

Appellants' statement that some of the deceased's contributions were made before he arrived at the age of twenty-one years and intimating, if not asserting, that they were not "voluntary" contributions and should not be considered in the determination of whether the deceased contributed to the support of his mother and brothers and sisters, is obviously based upon a misapprehension that a parent (or brothers or sisters) could not be dependent upon involuntary contributions which is erroneous reasoning on its face. The Act does not provide that dependency must be shown by voluntary contributions and no court has ever so held that we are aware of; in fact, as shown above, the courts have held that a finding of dependency may be proper even where because of circumstances there was no evidence of *any* contributions at the time of injury. In the case cited by appellants, *Standard Dredging Corporation v. Henderson,* 150 F. 2d 78, 80, the court stated that voluntary contributions may tend to show a need for them; it does not necessarily follow that if the contributions are involuntary they are not evidence of dependency and if said court intended such holding it is respectfully submitted that it is not consistent with the weight of construction in similar cases.

Limitation of $7500.00.

Appellants apparently contend (p. 25 *et seq.*) that in the case of an award to a mother and minor brothers and sisters, based upon partial dependency, the limitation should be less than the $7500.00 maximum provided in the Act. There are several answers to the contention: (a) that it was not raised in the court below and hence should not be considered here. (*Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937); *Ex parte Keiyo Kamiyama*, 44 F. 2d 503, 505 (C. C. A. 9, 1930); *Hecht v. Alfaro*, 10 F. 2d 464, 466 (C. C. A. 9, 1926); *Kortz v. Guardian Life Insurance Co. of America*, 144 F. 2d 676, 679 (C. C. A. 10, 1944); *Goldie v. Cox*, 130 F. 2d 695, 715 (C. C. A. 8, 1942); *Reconstruction Finance Corp. v. Sun Lumber Co.*, 126 F. 2d 731, 738 (C. C. A. 4, 1942); *Ramming Real Estate Co. v. United States*, 122 F. 2d 892, 893 (C. C. A. 8, 1941); *Atlantic Brewing Co., Inc. v. Wm. J. Brennan Grocery Co.*, 79 F. 2d 45, 47 (C. C. A. 8, 1935).) (b) The Act provides that the total compensation shall be limited to $7500.00 (Section 14(m), 33 U. S. C. A. Section 914(m) and a provision is not qualified in any manner. (c) Even if appellants' contention that partially dependent brothers and sisters should be limited more than children of a deceased employee, brothers and sisters of employed brothers are usually within close proximity to eighteen years of age, which is also a limitation upon their compensation award, whereas children of a deceased may or may not be near the age limit of eighteen years. However, all this is a matter for legislative policy and discretion rather than judicial construction, and appellants do not suggest what amount to apply in place of the $7500.00 limitation provided in the Act.

Award After Death.

Appellants state (p. 30) that

> "It is difficult to understand how any person could be dependent upon another person after the death of such last mentioned person. Appellants contend that the only reasonable construction of said Section 9 of the Act as applicable to the case at bar would be one which restricts the total award in favor of the mother to 25 per centum of the average wages earned by Robert Johnson, Jr., during the time she is able to prove she was actually dependent upon him if such dependency existed at the time of the injury and a limit of 15 per centum of such average wages earned by Robert Johnson, Jr., during the time the minor brothers and sisters are able to prove that they were actually dependent upon him if such dependency existed at the time of the injury."

Of course the entire purpose of the compensation law is to protect the dependents of the deceased employee "during dependency" as he protected them while he was alive. To construe "during dependency" with reference to the period of payment of compensation to dependents as being a period prior to the death of the deceased employee, would be inconsistent with the purpose of the law. The death benefit obviously is prospective.

II.

Findings of Fact and Conclusions of Law in the Court Below Were Not Necessary.

With reference to the findings of fact and conclusions of law we agree with the appellants that the Court, unless there is a trial *de novo,* has "no power to make findings of fact" in a review of administrative action. For a decision to that effect see *Chicago, M. & St. P. and P. R. Co. v. Scandrett,* 138 F. 2d 433, 435 (C. C. A. 7). Accord: *Steamship Terminal Operating Company v. Schwartz,* 1943 American Maritime Cases, page 90 (which arose out of the Longshoremen's Act). Compare: *Lucking v. Delano,* 122 F. 2d 21 (App. D. C. 1941); *Thomas v. Peyser,* 118 F. 2d 369 (App. D. C. 1941); *Somers Coal Company v. United States,* 6 Federal Rules Service, 52 a. l., Case No. 1. In judicial review under the Longshoremen's Act all that is required is an order or judgment to dismiss the complaint (if that is the decision). A trial *de novo,* if requested (there was no such request in the instant case) is proper in a proceeding for judicial review under the Longshoremen's Act only as to constitutional, judicial questions. (*Crowell v. Benson,* 285 U. S. 22.) The dependency of a claimant is not one of them.

Appellants inconsistently, however, complain that the court below "did not perform the required function of the District Court in matters of this kind" apparently because the court did not in some definite manner answer the contentions of the libel, "in the form of an opinion or conclusion of law." (App. Br. pp. 31 to 33.) While an opinion

in an involved case is helpful in understanding how the court arrived at a decision, where the question is whether the evidence supports a finding of dependency and the court determines that it does "there can be only one finding; that the Deputy Commissioner's findings are sustained by the evidence, and one conclusion of law; that the complaint must be dismissed." (Quotation is from Donahue's Case 1943, Amer. Mar. Cases p. 90.)

The Deputy Commissioner's Findings.

Appellants' complaint regarding the failure of the Deputy Commissioner to "discuss" the dependency and to explain "why and how the deceased's mother was a dependent of the deceased," is likewise not well taken. If the deputy commissioner were to state in the compensation order, in addition to the finding that the mother was dependent, why and how she was dependent it would mean the recitation of the evidence which showed how the mother was dependent and why she was dependent upon the deceased. The courts generally hold that only ultimate facts, not evidentiary facts, are necessary in a compensation order particularly as to an issue such as dependency which "may be proved as a fact without an arithmetical demonstration." (*Burns v. Connecticut Light & Power Company,* 97 Conn. 688, 118 Atl. 45, 146 A. L. R. 136 (1922). Accord: *Di Clavio's* case, 293 Mass. 259, 199 N. E. 732 (1936).) The weakness of Appellants' objection becomes more apparent when one attempts to comply with the request to state "why and how the mother was dependent."

We are not unmindful of the case of *Standard Dredging Corporation v. Henderson,* 150 F. 2d 78, which apparently was the source of the verbiage for plaintiffs' allegation (Article VIII(8)) as to the absence of a finding as to why and how the mother was dependent. Unfortunately in that case the insufficiency of the finding as to dependency was not the issue on appeal and was not developed or discussed in the brief on behalf of the deputy commissioner. We doubt whether the court would have held that the finding of the deputy commissioner (as distinguished from the evidence) as to dependency must show "why or how the parents were dependent" if full consideration had been given to the question. At any rate the deputy commissioner in the instant case should not be required to find "why and how the mother was dependent" in addition to the finding of dependency merely because it was so held in another case. Judicial error should not be perpetuated.

Appellants' complaint that the award was not limited to the period of dependency probably is based also upon the *Standard Dredging* case (*supra*). The court held that the award should have provided that payments were to continue "during dependency." Inconsistently the court held that the award need not provide for payment until the statutory limitation of $7500 is reached "for the quoted provision of the Act fixes a stopping point for the payments." Why one limiting provision in the Act need not be included in the award and another similar limiting provision which likewise "fixes the stopping point for the payments" need be included, is not apparent. The hold-

ing of the court in the *Standard Dredging* case (*supra*) is not in accordance with the weight of authority in similar situations. (*Clark v. Portland General Electric Company,* 111 F. 2d 703 (C. C. A. 9, 1940); *National Engineering Corporation v. Industrial Accident Commission of California,* 225 Pac. 2, 193 Cal. 422 (1924); *Woodward Iron Company v. Pean,* 217 Ala. 530, 117 So. 52 (1928); *Shay v. Aetna Life Insurance Company,* 200 A. 302 (Pa. Super. 1938); *Franzen v. Dupont,* 36 Fed. Supp. 375 (N. J. 1941).)

Appellants object because the deputy commissioner allegedly made no finding that the dependency existed at the time of injury. There may have been no finding in *haec verba* to that effect but it is submitted that the finding that "the employee left surviving him and dependent in fact upon him for support his mother," etc. in its legal import means that at the time of his death (the date of injury) the employee was survived by his mother and sisters and brothers who were dependent upon him. The words "left him surviving" have a well recognized legal meaning; they refer to the status at the time of death. In the words of

Judge Cardozo in *Swecting v. American Knife Company,* 226 N. Y. 200 (1919), affirmed 250 U. S. 596.

> "These findings, therefore, would be adequate even if the Commission were a court, but in truth it is not a court and the niceties of court practice have no place in its procedure. Its decision states the facts essential to liability. No more should be expected."

Accord: *Nouhat v. Board of Public Education,* 48 A. 2d 20, 159 Pa. Super. 423; *Texas Employers' Ins. v. Sheppeard, deputy commissioner,* 42 Fed. Supp. 669 (1938); *Finch v. Buffalo Envelope Co.,* 217 N. Y. S. 2d, 218 App. Div. 31 aff'd 244 N. Y. S. 557, 155 N. E. 895 (1926).

III.

The Claim on Behalf of the Brothers and Sisters Was Timely Filed and Properly Adjudicated Upon the Evidence Theretofore Taken.

Appellants state (p. 21 of their brief) that no claim was filed on behalf of the minor brothers and sisters. The certified record of the deputy commissioner, however, shows otherwise. Document No. 8 therein is, in substance, a claim for compensation on their behalf. It is dated September 9, 1946, well within the one year statutory period for filing claims. The record further shows that the employer and carrier were notified of the filing of the claim. (See Document No. 9 in the certified record.) The employer and carrier consented to have the claim of the brothers and sisters adjudicated upon the record without the taking of additional evidence. (See Document No. 10 in said record.)

Conclusion.

In view of the above it is respectfully submitted that the compensation order is in accordance with law and that the judgment of the court below should be affirmed.

Respectfully submitted,

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